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# In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-350

PACIFIC LIGHTING SERVICE COMPANY AND SOUTHERN CALIFORNIA GAS COMPANY, PETITIONERS

*v.*

FEDERAL POWER COMMISSION

No. 75-359

THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF CALIFORNIA, PETITIONERS

*v.*

FEDERAL POWER COMMISSION

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-5)[1] is not reported. The initial order of the Fed-

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 75-350.

eral Power Commission (*id.* at 6-9) and its order denying rehearing and reconsideration (*id.* at 10-14) are reported at 49 FPC 1243 and 50 FPC 343. The Commission's order denying a motion to vacate (*id.* at 15-17) is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on April 25, 1975 (*id.* at 1). Petitions for rehearing were denied on June 9, 1975 (*id.* at 18). Petitions for a writ of certiorari were filed on September 5 and 6, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

## QUESTION PRESENTED

Whether the court of appeals correctly determined that the Federal Power Commission did not abuse its discretion in declining to institute a hearing under Section 4(e) of the Natural Gas Act, and instead instituting a hearing under Section 5(a) of the Act, to review the lawfulness of a pipeline's curtailment plan.

## STATUTES INVOLVED

The relevant provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, are set forth at Pet. App. 19-24.

## STATEMENT

In April 1973, Transwestern Pipeline Company, anticipating an inadequate supply of natural gas to

meet all of its customers' demands, tendered for filing with the Federal Power Commission under Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d), revisions of its natural gas tariff, to take effect on June 1, 1973, establishing procedures for the curtailment of deliveries in the event of deficient supply. The Commission determined (Pet. App. 8) that "the Transwestern filing reflects priorities for curtailment consistent with our Statement of Policy" on curtailment priorities for pipelines.[2] Although several intervenors (petitioners in No. 75-350) requested the Commission to invoke its authority under Section 4(e) of the Act, 15 U.S.C. 717c(e), to suspend the operation of the tendered tariff revisions for the maximum five-month period and to institute a hearing concerning their lawfulness, the Commission, stating that "no specific grounds are stated in support of the requested suspension" (Pet. App. 8), ordered that the revisions be accepted for filing and declined to suspend their operation or to order a hearing under Section 4(e) (*id.* at 8-9). At the same time, the Commission authorized all the petitioners herein, customers of Transwestern, to intervene in the proceeding, and it stated that each could "file a petition for extraordinary relief from application of the filed curtailment plan or file a complaint under Section 5(a) of the Natural Gas Act, if [its] objections re-

[2] The Statement of Policy, Order No. 467, is set forth at Pet. App. 31-37. Subsequent amendments to that order are set forth at Pet. App. 38-53.

late instead to systemwide aspects of the curtailment plan" (*id.* at 8).

Petitioners filed applications for rehearing reiterating their request that the Commission order a hearing under Section 4(e) of the Act prior to permitting Transwestern's plan to become effective. The Commission determined that, since petitioners' "concern appears to be directed more to their position on the [curtailment] priority scale than [to] * * * the impropriety of the priorities themselves[,] * * * the need to initiate a Section 4 hearing to determine the lawfulness of the priorities *per se* has not been demonstrated" (*id.* at 11). While the Commission accordingly denied rehearing, it determined that "[t]he pleadings present issues that, in our judgment, should be adjudicated on the basis of an evidentiary record" (*ibid.*). It therefore construed California's [3] application for rehearing as a complaint filed under Section 5 and ordered the commencement of a hearing under that Section, in which "California, as complainant may have the opportunity to present evidence to sustain its burden of showing" that the curtailment plan ~~its burden of showing" that the curtailment plan~~ unduly discriminates against California's customers or that the plan's priorities should be altered in certain respects (*id.* at 11-12).[4]

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[3] "California" refers to petitioners in No. 75-359.

[4] The Commission thereafter stayed commencement of the Section 5 hearing in order to permit petitioners to seek judicial review of the Commission's orders (Pet. App. 15-17).

The court of appeals dismissed petitions for review of the Commission's orders (*id.* at 2-5). The court held that "the holding of hearings under [Section 4 of the Act is] discretionary rather than mandatory" and that the Commission did not abuse its discretion "on the facts before it in these cases" in ordering, instead, hearings under Section 5 (*id.* at 4). "The Commission's choice of § 5 as the hearing format for evaluation of objections to Transwestern's curtailment plan does shift the burden of proof,[5] but does not necessarily deprive the petitioners of a full and fair opportunity to present facts bearing upon the reasonableness of the curtailment priorities" (*ibid.*).

## ARGUMENT

The decision of the court of appeals is correct, and further review is not warranted.

Petitioners argue that the Commission was required to order a hearing under Section 4(e) of the Act on the lawfulness of Transwestern's tariff revisions before permitting them to become effective, that the Commission's determination to hold a Section 5 hearing instead of a Section 4 hearing unlawfully shifts the burden to them to show that the tariff revisions are unjust and unreasonable, and that permit-

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[5] In a hearing instituted by the Commission under Section 4(e), unlike a hearing instituted under Section 5(a), "the pipeline has the burden of proving that its plan is reasonable and fair" (*Federal Power Commission* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 645).

ting the tariff revisions to become effective was improper because the action is not supported by substantial evidence. Those arguments misconceive the structure of the Act.

1. As this Court stated in *Federal Power Commission* v. *Louisiana Power & Light Co.*, *supra*, the Act provides "[t]wo procedural mechanisms" (406 U.S. at 643) by which the Commission may review the lawfulness of a curtailment plan. When the plan is tendered for filing, the Commission, under Section 4(e), "may suspend the amended tariff for up to five months, at the end of which time the amended tariff becomes effective pending the completion of hearings" (*id.* at 645). Alternatively, the Commission may allow the plan to take effect and, upon a complaint or on its own motion, institute a hearing under Section 5(a). If, under either procedure, the Commission determines that the plan "is unjust, unreasonable, unduly discriminatory, or preferential," it may fashion a lawful plan and order its implementation (15 U.S.C. 717d(a); see also 15 U.S.C. 717c(e)).

Petitioners contend that the Commission was required to order a hearing under Section 4(e) before permitting the tariff revisions to become effective. Section 4(e) authorizes but does not compel the Commission to order a hearing prior to a plan's effectiveness. It provides that "the Commission shall have authority * * * to enter upon a hearing * * *." "Section 4(e) merely defines the power of the Commis-

sion; it *does not require* the FPC either to suspend a rate or to hold a hearing without suspension at the behest of a customer" (*Pennsylvania Gas & Water Co.* v. *Federal Power Commission*, 463 F. 2d 1242, 1245 (C.A. D.C.) (emphasis in original)).

Nothing in this Court's opinion in *Louisiana Power & Light* suggests the contrary. The Court there held that the Commission *may* properly proceed under Section 4 rather than Section 5. In explaining why the Commission had "chosen to process curtailment plans under §§ 4(c), (d), and (e)" (406 U.S. at 644), the Court noted the "substantial disadvantages" (*id.* at 643), from the standpoint of the public interest rather than the interest of private litigants, of the Section 5 procedure. It recognized, however, that both "procedural mechanisms are available" (*ibid.*).

The court of appeals here correctly held that the circumstances of this case justified the Commission's determination to proceed under Section 5 rather than Section 4. As the Commission stated (Pet. App. 11), petitioners' objections to Transwestern's curtailment plan related not so much to its unlawfulness *per se* but rather to the particular impact its priorities would have on petitioners' customers. The Commission reasonably concluded that those particularized complaints, while calling for "adjudicat[ion] on the basis of an evidentiary record" (*ibid.*), could most appropriately be considered in a Section 5 proceeding, in which petitioners would have an opportunity

to demonstrate the alleged discriminatory impact of the plan on their customers.

2. That the burden of proof in such a proceeding falls on the complaining parties rather than on the pipeline does not invalidate the Commission's choice. That consequence follows under the terms of the statute whenever the Commission elects to proceed under Section 5 instead of Section 4. If, as we have shown, the Commission has discretion to make that election, its choice can hardly be challenged on the ground that the statute thereby places the burden of proof on a different party. What is important, as the court of appeals correctly stated, is that petitioners are accorded "a full and fair opportunity to present facts bearing upon the reasonableness of the curtailment priorities" (Pet. App. 4). Any complaint that petitioners may have concerning the conduct of the hearing may, of course, be made the subject of judicial review after the Commission reaches a decision based upon the hearing record.

3. Petitioners argue that the Commission's order in this case—which accepted Transwestern's tariff revision for filing, declined to suspend the operation of the curtailment plan, and declined to order a hearing under Section 4(e)—is not supported by substantial evidence. The Commission could have rejected the plan for filing if it had been "patently * * * either deficient in form or a substantive nullity" (*Municipal Light Boards* v. *Federal Power Commission*, 450 F. 2d 1341, 1345 (C.A. D.C.), certiorari denied, 405

U.S. 989). Petitioners do not contend that Transwestern's plan should have been rejected under that standard. Nor do they seek review of the Commission's determination not to suspend the operation of the plan (see Pet. No. 75-350, p. 24), for "it is settled that the refusal to suspend a filed rate is a nonreviewable exercise of agency discretion" (*Municipal Light Boards* v. *Federal Power Commission, supra,* 450 F. 2d at 1351).

Petitioners claim only that the Commission should have ordered a Section 4 hearing before allowing the plan to become effective. A tariff revision accepted for filing with the Commission under Section 4(d) of the Act, however, becomes effective, not because of any Commission action ordering its effectiveness, but by operation of the statute. As this Court stated in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 342:

> Section 4(d) provides not for the filing of "proposals" but for notice to the Commission of any "change . . . made by" a natural gas company, and the change is effected, if at all, not by an order of the Commission but solely by virtue of the natural gas company's own action. If the purported change is one the natural gas company has the power to make, the "change" is completed upon compliance with the notice requirement and the new rate has the same force as any other rate—it can be set aside only upon being found unlawful by the Commission. * * * Likewise, no "proceeding" is "initiated" by a

> § 4(d) filing. A proceeding to review the new rate may be initiated under § 4(e), but, if so, it is initiated by the Commission * * *.

To the extent that petitioners seek to challenge the curtailment plan on the merits, therefore, the proper procedure is to present their evidence and arguments in the Section 5 hearing that the Commission has instituted and (if necessary) to seek judicial review of the Commission's final decision. The Commission's findings in that proceeding will be subject to review under the substantial evidence standard. See Section 19(b) of the Act, 15 U.S.C. 717r(b).

The Commission's determination not to institute a Section 4(e) hearing, however, if it is reviewable at all, may be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). Since the decision *whether* to institute a Section 4(e) hearing obviously is not required itself to be "based on a public adjudicatory hearing" (*Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 414), review under the substantial evidence standard is not authorized. See 5 U.S.C. 706(2)(E).

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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